DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RECEIVED

JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)))	MM Docket No. 92-265
Development of Competition and Diversity in Video Programming Distribution and Carriage		

COMMENTS OF
UNITED VIDEO, INC.

United Video, Inc.
3801 S. Sheridan Road
Tulsa, OK 74145

January 25, 1993

No. of Copies rec'd 0+4
List A B C D E

CONTENTS

SUMMARY

It is essential that the Commission in adopting regulations recognize the basic differences between satellite broadcast programming vendors and satellite cable programming vendors, as well as the basic differences in the cable and HSD markets. In the 1992 Cable Act, Congress directed the Commission to "rely on the marketplace to the maximum extent feasible", to achieve the goal of increasing availability of programming to the public. Thus, any regulations adopted under Section 628 should be the absolute minimum needed to achieve the goals of the statute and should not unnecessarily replace competitive marketplace forces.

The following factors should be considered:

- There are different classes of service for cable operators and home satellite dish ("HSD") distributors and valid comparisons of cable and HSD per subscriber pricing cannot be made.

- With regard to vertical integration of program suppliers, there should be specific ownership thresholds and exemptions for *de minimis* ownership interests.

- Section 628 prohibits only unfair conduct that also "hinders significantly" delivery of programming to consumers.

- Volume discounts are essential for superstation programming vendors to remain viable.

- The Commission should establish reasonable parameters and limitations on "buying groups" to prevent the formation of sham groups seeking to obtain unwarranted pricing discounts.

- The most appropriate standard for defining discrimination is "Option 2" in the NPRM in which the Commission proposes to adopt a standard of review based on Section 202(a) of the Communications Act.
- The rules adopted pursuant to Section 628 should not be applied retroactively.
- Perhaps the most significant aspect of this proceeding is the Commission's proposal to avoid frivolous complaints by requiring that the complainant establish a *prima facie* case before any complaint proceedings are commenced.

United Video as a superstation programming vendor operates in a unique and highly competitive market, which has and will continue to prevent any unreasonable discrimination. United Video has established a long track record of serving all technologies thereby expanding its superstation distribution to the public in the most effective manner possible.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RECEIVED

JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Sections 12 and 19) MM Docket No. 92-265
of the Cable Television Consumer)
Protection and Competition Act of 1992)

Development of Competition and
Diversity in Video Programming
Distribution and Carriage

COMMENTS OF
UNITED VIDEO, INC.

United Video, Inc. hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), released December 24, 1992, concerning implementation of new program access and pricing rules.

I. INTRODUCTION

United Video, Inc. ("United Video" or "UVI") provides four superstation services, as well as other services, by satellite primarily to facilities-based operators (mainly cable systems) throughout the United States and Canada.

United Video has delivered television and other signals via terrestrial microwave to cable television systems since 1965. In 1978 the Commission authorized United Video, pursuant to Section 214 of the Communications Act, to distribute WGN-TV via satellite to cable television systems in the United States. Following the Commission's deregulatory decisions in the Competitive Carrier Rulemaking Proceeding in Docket No. 79-252, United Video and other carriers began providing additional "superstation" signals and various other services by satellite. United Video's services go far beyond mere transmission. For facilities-based operators, including cable, SMATV and MMDS, United Video's superstation services include transmission, signal authorization, replacement programming, and other components necessary for delivery of superstations to such customers. These services are used by the facilities-based operators for delivery of superstation signals, selected by the operator, to the operator's headend satellite receiving dish, so that each operator can reprocess and retransmit the signals to its subscribers.

Program distribution to the home satellite dish ("HSD") market was conceived and developed well after service to facilities-based (cable) operators had been established. Providing superstation services to HSD owners thus created an entirely new market for satellite programming. This market was essentially a "retail" market whereby programming was sold directly to consumers and no facilities-based intermediaries are (or could be) part of the programming delivery process. In March 1987 the same superstations sold to cable operators by

United Video were offered to the HSD market by a separate organization, Superstar Connection.[1/] At that time there was no HSD market, no HSD subscribers, and no copyright payment mechanism. United Video took substantial risk by investing in Superstar Connection for the necessary sales, authorization and customer service facilities before any revenue streams from this new HSD market even existed.

Terminology and Definitions. By virtue of uplinking and distributing superstations, United Video is a "satellite broadcast programming vendor" within the meaning of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act" or the "Act"). In these comments, we refer to United Video as a satellite broadcast or "superstation" programming vendor to emphasize the fundamental differences between superstation programming and other satellite delivered programming services.[2/]

1/ United Video and Superstar are separate corporations under common ownership. Because of the very different classes of services provided by the two companies, Superstar is filing separate comments in this proceeding to address issues relevant to its own operations.

2/ The Act recognizes that distinction by defining a satellite cable programming vendor as one who uplinks and distributes non-superstation programming. § 628(i)(2).

"Superstation" is the term describing a television broadcast station, other than a network station, which is licensed by the Commission as a broadcast station and whose signal is transmitted via satellite for point-to-multipoint distribution throughout the United States.

In these comments, United Video uses the term "facilities-based operators" or "UVI customers" to refer collectively to cable, SMATV, and MMDS systems carrying United Video superstation services. The term "distributor" is used only to denote HSD customers of Superstar Connection. While facilities-based operators "distribute" superstation services from their headends to consumers, the term "distributor" in these comments is not used to identify cable, SMATV or MMDS system operators, nor to refer to United Video, Inc. or other superstation programming vendors.

II. CONGRESSIONAL INTENT

Congress' high hopes were expressed in Section 628(a) of the 1992 Cable Act to "increase competition and diversity in the multichannel video programming market". But most of the provisions to be implemented address what was perceived solely as a problem with vertically integrated programming vendors favoring their affiliated cable operators.[3/] In the absence of such

---

3/ Although condemning certain practices of vertically integrated programmers, Congress specifically found that verti-

[Footnote Continued Next Page]

favoritism, contractual negotiations for programming should be shaped by marketplace forces -- not micromanaged by regulation.

The Commission has expressed its general agreement with such an approach and has rightly noted that, while serving congressional intent to prohibit unfair or anticompetitive actions, the Commission should allow marketplace forces to operate whenever possible. NPRM § 12. The Commission is to "rely on the marketplace to the maximum extent feasible, to achieve" the goal of increasing availability of programming to the public. 1992 Cable Act, § 2(b)(2). Particularly in the absence of any demonstrated anticompetitive conduct or harm to consumers, the Commission should not restrain unduly the satellite broadcast programming vendors by failing to recognize (a) distinctions in classes of service and the various competitive business practices exercised in these service classes and (b) vendors' efforts to maximize efficient program distribution to the public.

[Footnote Continued]

cal integration in the cable industry was beneficial in that it contributed to the deployment of a substantial amount of new programming. House Report at 41.

III. DIFFERENCES BETWEEN SATELLITE BROADCAST PROGRAMMING VENDORS (SUPERSTATIONS) AND SATELLITE CABLE PROGRAMMING VENDORS (CABLE NETWORKS)

The FCC has noted that "satellite cable programming vendors" are actually "selling rights to the programming" while "satellite broadcast programming vendors" are primarily selling a delivery service to cable and other facilities-based operators. We concur that this is a significant difference, but there are other differences as well, which warrant different treatment in FCC regulation. These differences include:

- Cable operator regulatory requirements compelling satellite broadcast programming vendors to resolve such complex problems as sports blackouts, nonduplication blackouts, and syndicated exclusivity, that do not apply to cable networks.

- Virtually no entry barriers for potential competitors of satellite broadcast programming vendors, compared to cable networks, as evidenced by the competition already existing in the superstation business. In no case are there two competing cable networks offering exactly the same signal to the marketplace.

- There is a *de facto* limit to the number of superstations a cable system may carry created by the penalty copyright rate established in the cable copyright rate structure. Thus, superstation vendors compete in a finite market with the ceiling established by law (a static market potential). Cable networks, on the other hand, have no such legal ceiling and their marketplace is limited only by the channel capacity of facilities-based operators, a technological ceiling which is rising (market potential increasing) constantly.

Exhibit 1 summarizes the differences between superstations and cable networks. Exhibit 2 shows superstation vendors and the services they offer, illustrating the level of competition which currently existing in the superstation marketplace. Considering all of these factors, particularly open entry and the highly competitive marketplace for superstations, it is appropriate that the Commission impose different and less stringent regulatory standards on superstation vendors than on cable networks.

IV. DIFFERENCES IN CABLE AND HSD MARKETS

In this proceeding, the Commission has noted that "multichannel video programming distributors" may include all types of distributors and sought comments on the propriety of such a definition. The Commission must distinguish not only between types of distributors, but account for the vastly different cable and HSD markets in which business operations vary dramatically.[4/] Unlike the facilities-based operators, distributors in the HSD market have much lower overhead, no investment in facilities to distribute programming, function more in a sales

---

4/ For example, cable operators cannot sell or deliver services to MMDS subscribers. HSD distributors only can sell to HSD consumers. No HSD distributor has the functional capability of delivering any service directly to any HSD consumer, let alone to any cable or MMDS subscriber.

capacity, and perform no essential function in delivering programming to HSD customers.

Moreover, the services United Video provides to facilities-based (cable, SMATV and MMDS) operators are, in fact, quite different from the services provided by Superstar to the HSD market. United Video provides the facilities-based operators with a satellite transmission service, delivering superstation signals without cable copyright clearance to the headend's satellite receiving dish. For example, one dish may ultimately serve tens of thousands of subscribers using the cable operator's own physical plant. The only manner in which superstation signals can be delivered to cable subscribers is through a cable operator's facilities. A cable operator receives the signal, reprocesses it and retransmits it to each cable subscriber directly as part of a programming package.

To describe United Video's superstation services as "only transmission" ignores the related and essential services provided to facilities-based operators essential for lawful and competitively attractive delivery to customers. These services are described in Exhibit 3, which compares unique costs for facilities-based operators and HSD. Exhibit 4 shows unique costs for serving HSD and Exhibit 5 shows unique costs for serving facilities-based operators.

United Video sells superstation transmission service to 9,900 cable operators, and 4,700 SMATV and MMDS operators throughout the United States. United Video's services reach nearly 40 million homes.

United Video maintains a "back office" operation entirely separate and distinct from Superstar's HSD operation. United Video's back office handles operator authorizations, technical service questions, programming, syndex notice verification, FCC required blackout verification, as well as sales and marketing. Over 3,000 calls per month are fielded by UVI facilities-based operator customer service representatives. UVI customer calls are complex and normally require more people and more time than do Superstar Connection HSD customer calls; many typically involve technical and legal assistance outside United Video.

United Video must also substitute programming due to cable operators' syndicated exclusivity ("syndex") requirements. Syndex requirements vary depending on the superstation signal involved and local broadcasters' demands. United Video reviews 8,700 syndex notices annually and maintains a library of approximately 8,000 programming titles that are reviewed for syndex requirements. Syndex program deletions and substitutions require a complex series of program changes and significant costs to

United Video. In addition, and as noted previously, cable operators, unlike HSD distributors, pay all royalties and copyright fees necessary to obtain the compulsory copyright license under 17 U.S.C. § 111.

In addition, cable operators must pay copyright fees for all superstation signals and must pay exorbitantly high fees if they distribute more than a specific number of superstations (usually two superstations). Accordingly, there is substantial competition among the superstation vendors to fill those two slots with one of the limited number of superstations services. In the HSD market, there is no such limitation.

The characteristics of the HSD and facilities-based operator markets thus comprise two distinct and unlike classes of service. Accordingly, the Commission should clearly recognize two discrete classes of service and customers -- facilities-based operators and HSD -- and not impose uniformity of prices or otherwise unitize treatment to these dissimilar markets. Unless these separate classes of service are carefully distinguished by the Commission in adopting regulations, some HSD distributors could obtain rates which would distort the markets by treating them similarly to facilities-based operators. While this might increase profits of some HSD distributors, it would ultimately reduce the availability of programming and limit diversity by eliminating many of the existing superstations. As it stands now, the HSD market is growing rapidly. Because programming availability to the consumer is the touchstone of congressional intent, the Commission should be wary of adopting any regulations that may adversely impact that availability.

V. INVALID COMPARISONS OF CABLE AND HSD CONSUMER PRICING

Due to the different characteristics of the markets for cable and HSD superstation services, consumer prices in these markets cannot be compared to determine whether such pricing has affected growth and program distribution to consumers. Attempts to compare facilities-based operator and HSD pricing is simply not relevant and results in two glaring misconceptions:

- First, the assumption that there is a large area of overlap between facilities-based customer costs and HSD customer costs is incorrect. Although there is some commonality in transmission costs, such costs for facilities-based customers represent 42% of total operating costs, while HSD transmission costs represent a much smaller percentage of total operating costs. The remaining costs are necessary and unique to each class of service. There are significant non-transmission costs unique to each business.

- The second incorrect assumption is that, since HSD services are priced on a per household basis, valid cost comparisons can be made between HSD and facilities-based operators on a per household basis. The HSD unique costs are allocated across a customer

> base of 500,000 HSD homes, while the facilities-based operator costs would be allocated across a customer base of 30 million cable homes. For example, a $100,000 annual HSD cost would amount to 20 cents per HSD home. A $100,000 annual facilities-based cost would amount to 3 cents per cable home. Can there be anything but significant cost differentials between facilities-based and HSD pricing given the costs unique to each class of service and differing customer bases?

VI. PROGRAM ACCESS -- VERTICAL INTEGRATION OF PROGRAM VENDORS

The issue most important to Congress was the "incentive and ability" of vertically integrated programming suppliers to favor affiliated cable operators over other multichannel distributors. "It is the policy of Congress ... to ... ensure that cable operators do not have undue market power vis-a-vis video programmers and consumers." 1992 Cable Act § 2(b)(15).

The Commission has requested comment on what "threshold" ownership interests would be considered attributable for determining whether or not a vendor is vertically integrated. NPRM ¶9. Because a programming vendor would not be able to "favor" a minority owner/affiliate without control of the corporation, attribution should occur only at a level of control, of at least 51%, or otherwise by contract control needed to dominate corporate decision-making. Otherwise, the Commission would be condemning all investments made by any cable interests in any programming vendor without any evidence that such minority interests influence the programming vendor's policies or business operations.

While portions of Section 628 apply to all satellite broadcast programming vendors, whether vertically integrated or not, the Commission has sought comment on whether vertical integration issues should logically be extended to satellite broadcast programming vendors as well. At a minimum, Commission regulations should allow non-vertically integrated satellite broadcast programming vendors -- vendors with *de minimis* or limited interests in the cable industry -- considerable latitude in determining the terms of their business relationships with both of the service classes they serve. The business of distributing superstation programming is a highly competitive business characterized by open entry and is thus very different from that of satellite cable networks. Because of the compulsory copyright license applicable to superstation programming, there are absolutely no restrictions or limitations on any party wishing to enter and compete in the market of providing superstation programming services. Entry requires only the necessary (but substantial) investment in uplink equipment, a transponder lease, back office operations, programming, customer service, marketing and other necessary expenses. Anyone seeking to avoid that investment must necessarily pay one of the existing superstation programming vendors for the right to market that programming to consumers. However, satellite cable programming vendors (i.e., other than superstations) are exclusive, and proprietary to the programming vendor. Thus other parties are excluded from selling or duplicating that programming.

As suggested in paragraph 8 of the NPRM, appropriate implementing regulations should respect these differences and accord significant flexibility to superstation programming vendors who have no legal right or ability to exclude or restrain competition in the superstation programming market. Moreover, the differences between the programming vendors and their related functions also justify different treatment, as suggested in the NPRM at paragraph 8, note 20.

Unless implemented to reflect the nature and operation of the different classes of service, the substantive provisions of Section 628 could dramatically alter the relationships between programming vendors and their customers by limiting the ability of parties to freely negotiate in a competitive marketplace. Section 628(b) generally proscribes only "unfair competition and unfair or deceptive practices", with the specifics to be covered by implementing regulations. Some potential restrictions discussed in the NPRM are directed at specific business practices, which are not anticompetitive or harmful in any way.

A basic purpose expressed in Section 628(a) is to "spur the development of technologies". This purpose reflects Congress' concern that vertically integrated cable programming vendors could retard such development by denying reasonable program access. United Video's record in providing program access to new technologies is demonstrated in Exhibit 6. United Video's record of open access to all its superstation services was not the result of regulatory requirements, but instead was established by the Company in response to the competitive marketplace in which it operates. Accordingly, there is no need for detailed program access regulations for satellite broadcast programming vendors.

VII. SECTION 628 PROHIBITS ONLY UNFAIR CONDUCT WHICH CAUSES SIGNIFICANT HARM

The Commission has requested comment on the proper interpretation of the substantive provisions in Section 628(b) which prohibit satellite broadcast programming vendors from engaging in "unfair methods of competition or unfair or deceptive acts or practices" the purpose or effect of which is to "hinder significantly" or "prevent" delivery of programming to consumers. Section 628(b). NPRM at ¶6. As the Commission correctly noted, the Act provides that the Commission prohibit in its regulations "particular conduct" that is both "unfair" and "harmful". Accordingly, any specific conduct prohibited by regulation must both be unfair and cause "significant harm".

The "significant" harm Congress envisioned was the favoritism vertically integrated entities could employ to protect their own affiliates while restraining competition by discriminating against non-affiliated customers. NPRM ¶7. Because of Section 628's intended objectives it must be assumed that any conduct, pricing mechanism, or other term or condition imposed by "non-vertically integrated" entities would be presumed not to be harmful. Accordingly, the implementing regulations should exonerate all conduct pursued by non-vertically integrated entities, as well as that conduct by vertically integrated entities identical or similar to the conduct of non-vertically integrated entities. Such an approach would be true to the congressional purpose behind Section 628 because many non-integrated vendors may indeed pursue acts or practices which a competitor considers "unfair" because competition, in its ultimate form, requires that there be winners and losers in the never-ending quest for market share. In other words, competition works to the benefit of consumers by eliminating inefficient distributors.

> There is a difference between injuring competition and injuring, or even forcing into bankruptcy, a competitor. Inefficient competitors can be driven out of a market by normal price competition; yet, this competition benefits consumers by lowering the price and raising the quality of services and products available to them.

Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923, 945 (1984). Accordingly, with competition as the ultimate desired effect of the statute, price competition should be expressly allowed. The mere existence of different prices, terms or conditions should not be determinative of a violation of the statute; rather, it would only be the effect of the price, terms and conditions on competition that would govern whether such differential treatment is prohibited.

This is a sensible result and is consistent with existing antitrust laws which strongly encourage price competition.

> To hold that the antitrust laws protect competitors from the loss of profits due to such price competition, would in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such results for '[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.'

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 116 (1986) (quoting Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1057 (6th Cir. 1983), cert. denied, 469 U.S. 1036 (1984). Price competition is the essence of pro-competitive conduct and any law that would disallow pricing differentials also would ban conduct that benefits consumers.

Thus, the express wording of the statute would allow "unfair" practices that do not significantly harm or prevent distributors from providing programming to consumers and also would allow "fair" practices that may in fact hinder or prevent programming distributors from distributing programming to consumers. Because price differentials by themselves are not unfair, and differences in treatment -- as well as discrimination -- are not inherently "unfair", such conduct should not be prohibited outright. Moreover, this analysis is significant, as noted by the Commission, where unfair discriminatory conduct may harm a competitor but does not significantly harm competition in multichannel video programming distribution. NPRM ¶10. This is also true to Congress' purpose of increasing the availability of programming to rural areas and other areas not currently served by multichannel video program distributors and also to spur the development of competing technologies. If these objectives are being met, that one particular video programming distributor may be unhappy with the terms and conditions of one component of its programming package, is of no statutory or regulatory significance.

Accordingly, the threshold requirement would dictate an analysis demonstrating that the challenged practice of the satellite broadcast programming vendor <u>both</u> (i) "significantly hinder" program distribution to consumers and (ii) is unfair, deceptive or discriminatory.

These concepts are essentially borne out in the Commission's acknowledgment of Congress' intent to rely on the marketplace to the maximum extent feasible. The Commission already has agreed with this conclusion when, in the context of reviewing prior claims of discrimination, the Commission found that price regulation would be less effective than "assuring entry by new competitors". Second Scrambling Report, 3 FCC Rcd at 1209, ¶61. Deregulatory initiatives at the Commission over the years have established a policy of total open entry into the business of being a satellite broadcast programming vendor id. at ¶35. The Commission has embarked on a clearly charted path of eliminating unnecessary and potentially harmful regulation of fully competitive markets to create significant benefits for consumers, In re Competition in the Interexchange Marketplace, 5 FCC Rcd 2627, 2649, ¶188 (1988).

VIII. UNFAIR PRACTICES -- DETAILED ALLEGATIONS

In the NPRM, the Commission also seeks "detailed allegations or evidence" regarding unfair practices in order to assist in prescribing regulations governing particular conduct. In considering these issues, the Commission should not adopt any standard that disallows necessary price differentials. Differences in operations and marketing strategies are critical to the survival of competing technologies. Because satellite broadcast programming vendors are non-dominant with respect to provision of their services, impermissible price discrimination simply is not possible. _See_ _Competitive Carrier Rulemaking_, 95 FCC 2d 554 (1983). Indeed, the fact that differentials and various rates exist does not establish discrimination; rather, price differentials offered by satellite broadcast programming vendors lacking market power are _indicative of competition_, not price discrimination. _Competitive Carrier Rulemaking_, 85 FCC 2d 1, 31.

A. "Undue Influence" and Programming Distribution

The 1992 Cable Act directs the Commission to proscribe conduct by vertically integrated programming vendors that may be characterized as "undue influence" by the cable operator upon a programming vendor's decisions in selling programming. This is an entirely subjective approach and "undue influence" in other circumstances has been found to be difficult to apply.

The concept of "undue influence" is not subject to simple definition. One functional definition of undue influence, while arising specifically under contract law, has applicability in this area: